

**CITY OF SAN DIEGO
ETHICS COMMISSION**

Office of the Executive Director

MEMORANDUM

DATE: September 9, 2009

TO: The Committee on Rules, Open Government and Intergovernmental Relations

FROM: Stacey Fulhorst, Executive Director

SUBJECT: Investigation and Enforcement Procedures (SDMC §§26.0401 et seq.)
Docketed for Rules Committee Consideration on September 16, 2009

The Ethics Commission's Investigative and Enforcement Procedures were adopted by the City Council on February 11, 2002. The Commission has worked with these procedures for seven years and, as a result of its experience, is recommending that the Municipal Code be amended to expand the Commission's subpoena power to include witness subpoenas during investigations and to add a prohibition on the provision of false evidence. These two recommendations are discussed in greater detail below.

The recommended changes were originally part of a larger package of proposed amendments presented to the City Council in October of 2008. Although the City Council approved the remainder of the proposed changes, the Council sent these two items back to the Rules Committee for further discussion in light of concerns raised by the Office of the City Attorney. As explained in detail below, the Ethics Commission has since conferred with the City Attorney's Office and incorporated additional language into the proposed amendments in order to address the previously-expressed concerns.

It is relevant to note that the concerns previously expressed by the City Attorney's Office were delineated in a memorandum dated October 9, 2008, which was prepared during the administration of the previous City Attorney. The current City Attorney, Jan Goldsmith, has advised the Commission that his office will not be providing any input on the policy decisions that accompany the recommended changes. Instead, he has recommended the addition of several provisions to mitigate concerns previously raised by his office. Each of City Attorney Goldsmith's suggestions has been incorporated into the proposed amendments.

In the event that some Councilmembers might have lingering concerns about the issues raised in the October 2008 City Attorney report, we have obtained an independent legal opinion from the law firm of McDougal Love Eckis Boehmer Foley & Lough. The memorandum was drafted by Lisa Foster, who was a Deputy City Attorney in the San Diego City Attorney's Office for fourteen years. She worked in the City Attorney's Public Policy Unit until 2005, when she joined

her current firm where she specializes in public agency law. Specific aspects of Ms. Foster's analysis of the Commission's proposed amendments are discussed in detail below.

Subpoenas of Witnesses During Investigation

Background:

In March of 2002, the voters approved a ballot measure granting the Ethics Commission the power to subpoena witnesses and documents in accordance with procedures approved by the City Council. The procedures adopted by the City Council and memorialized in the Municipal Code provide that the Commission may issue document subpoenas during an investigation and in connection with a hearing. With respect to witness subpoenas, however, the procedures currently provide that the Commission may compel witness testimony only at a hearing.

Proposed Amendment:

The Commission recommends adding language to the Municipal Code to state that the Commission may issue witness subpoenas during the course of a Commission investigation.

Rationale:

If adopted, the proposed amendment will achieve the following:

- ✓ It will ensure that the Commission has the necessary tools to conduct effective investigations into alleged violations of campaign laws, lobbying laws, and ethics laws.
- ✓ It will enable the Commission to conduct a thorough investigation prior to scheduling a hearing.
- ✓ It will provide a layer of protection for witnesses who fear retaliation for voluntarily cooperating with a Commission investigation.

It is relevant to note that a recent report issued by the San Diego County Grand Jury (filed June 3, 2009) concluded that "subpoena power for testimony during the investigative process would better serve the citizens of San Diego by: shortening the investigative process, providing protection for people who provide information to the investigator and often eliminate the need for a Commission hearing as the information provided has disproved the allegation(s)."

It is also relevant to note that comparable administrative ethics enforcement agencies throughout the state (e.g., Los Angeles Ethics Commission, San Francisco Ethics Commission, and the Fair Political Practices Commission) have the ability to subpoena witnesses during investigations. In other jurisdictions, the subpoena authority is delegated to the staff, whereas in San Diego all requests for subpoenas must be submitted to and approved by the Ethics Commission, thereby providing another layer of oversight.

Legal Issues:

Although the Ethics Commission consistently provides a host of rights and protections to respondents and witnesses during the course of its enforcement activities, we have incorporated

the following provisions into the draft ordinance in order to alleviate any concerns regarding due process considerations:

- The proposed amendments contain a provision requiring that investigatory subpoenas specify the area of inquiry.
- The amendments include language stating that witnesses have the right to legal representation during questioning.
- In addition to referencing the Administrative Procedures Act, the amendments refer to specific California Government Code sections relating to the issuance and service of investigative subpoenas.
- The amendments require that Commission staff make an effort to obtain information and documents on a voluntary basis before asking the Commission to issue a subpoena (except in extraordinary circumstances), and clarify that the Commission will not issue a subpoena unless it finds that there is good cause to do so.
- The amendments provide that each witness shall have the right to request that the interview be recorded, and to obtain a copy of the recording.
- In addition to referencing applicable provisions of the Code of Civil Procedure, the amendments refer to California Government Code sections 7465 and 7474, which relate to the issuance of subpoenas for financial records.
- The amendments refer to California Government Code sections 11180 through 11191 with respect to the process for petitioning the San Diego Superior Court for an order to enforce a Commission subpoena, and they clarify that the failure to obey a subpoena may be considered contempt and prosecuted as a misdemeanor only after a person has failed to comply with a San Diego Superior Court order enforcing the subpoena.

As explained above, City Attorney Jan Goldsmith has advised the Ethics Commission that the foregoing provisions alleviate his concerns regarding the legality of the proposed amendments. In addition, he advised us that his office will not be making any recommendations on related policy decisions.

During the prior City Attorney administration, however, a memorandum was issued to the Mayor and Council concerning the proposed amendment. This memorandum included the following opinions: (1) the voters did not intend for the Commission to have the ability to subpoena witnesses during investigations, and (2) a comprehensive set of procedures for the protection of witnesses and guidance for investigators is necessary. As explained above, the Commission has obtained an independent opinion from attorney Lisa Foster. Ms. Foster concluded as follows with respect to the opinions previously expressed by the City Attorney's Office:

- (1) The conclusion that voters did not intend to grant the Commission the power to subpoena witnesses during an investigation is inconsistent with the fundamental rules of construction that apply to the interpretation of ballot measures. Because the language of

the initiative is clear and unambiguous, there is no need to attempt to determine voter intent by examining other factors. Instead, the ballot measure language specifically refers to the need for subpoena powers during investigations, and contains no language suggesting that the subpoena power be limited to hearings only.

- (2) Because the City Attorney's Office did not cite any legal authority to support the proposition that a comprehensive set of procedures are necessary, this opinion appears to be based on a policy concern regarding potential abuse of the Commission's subpoena power, rather than a legal analysis. In fact, as a matter of law, the U.S. Supreme Court (*Hannah v. Larche*, 363 U.S. 420 (1960)) has determined that constitutional due process protections are not afforded to persons involved in an administrative fact-finding investigation conducted by a government agency (although they apply to respondents at administrative hearings that are initiated by an agency after a fact-finding investigation).
- (3) Despite the fact that the Commission is not legally required to recognize any due process rights for witnesses contacted during the course of an investigation, the current as well as the proposed procedures provide numerous significant protections for subpoenaed witnesses. According to Ms. Foster's analysis, there is no legal basis for requiring any additional procedures.

As the Court noted in the above-cited case, if due process rights were afforded to individuals involved in a fact-finding investigation, it "would make a shambles of the investigation and stifle the agency in its gathering of facts." *Id.* at 444. In other words, it is important that agencies like the Ethics Commission have the flexibility necessary to conduct an effective investigation without being bound by a rigid set of procedures. This belief is underscored by the complete lack of codified investigative procedures in other comparable jurisdictions.

Prohibition on Providing False Evidence

Background:

There have been several instances over the past few years in which individuals have knowingly provided false evidence to the Commission (both verbally and in writing) during the course of an investigation.

Proposed Amendment:

The Commission recommends adding a provision to the Municipal Code making it unlawful for anyone within the Commission's jurisdiction to knowingly provide false information or documentation regarding a material fact during a Commission investigation or at a Commission hearing.

Rationale:

Adding this prohibition should serve as an additional incentive for witnesses and respondents to be truthful and forthcoming during the course of a Commission investigation. In addition, it will provide an important administrative remedy in the event that someone knowingly provides false evidence.

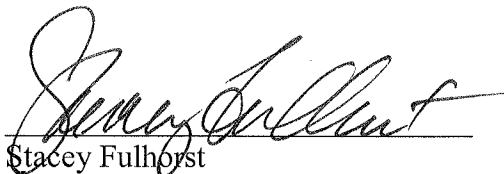
Legal Issues:

The memo distributed by the City Attorney's Office in October of 2008 included an opinion that the proposed amendment is preempted by the state perjury law codified at Penal Code section 118. According to the attached memorandum from attorney Lisa Foster, however, the proposed prohibition is not preempted by state law because it is different in scope and remedy, and because it does not contradict state law.

Moreover, Ms. Foster found no authority to support the proposition that the state law fully occupies the field of false information laws. In fact, false information ordinances are extremely common in local law and have coexisted with state law for many years. By way of example, the San Diego Municipal Code contains at least thirteen different false information provisions, one of which subjects people who "mislead" the City's outside auditors to criminal misdemeanor penalties, and was unanimously approved by the City Council on June 22, 2009. Furthermore, during her research Ms. Foster identified twelve municipal codes for other cities in San Diego County that contain false information provisions.

In addition to the preemption issue, the City Attorney's Office verbally recommended that an independent hearing officer (instead of the Ethics Commission) serve as the ultimate adjudicator with respect to alleged violations of this provision. The City Attorney's Office also suggested that the Commission's proposed amendments incorporate existing sections of the Municipal Code applicable to the use of "Enforcement Hearing Officers" at administrative hearings. (SDMC §§ 12.0806, 12.0807). The Commission concurs with these suggestions and has incorporated the relevant language into the proposed amendment.

For your convenience we have drafted the attached strike-out version reflecting proposed changes to selected portions of the Commission's procedures. We look forward to discussing these proposed amendments with you at the Rules Committee meeting on September 16, 2009. If you have any questions, please contact me at your convenience.



Stacey Fulhorst
Executive Director

Attachments

cc: Catherine Bradley, Chief Deputy City Attorney

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ETHICS COMMISSION

MEMORANDUM

To: Stacey Fulhorst, Executive Director
San Diego Ethics Commission

From: Lisa A. Foster, Special Counsel *LF*

Date: July 30, 2009

Subject: Issues Related to Proposed Changes to Investigation and Enforcement Procedures

Introduction

You asked this office to provide a legal opinion regarding some proposed amendments to the Ethics Commission's Investigation and Enforcement Procedures, because of concerns expressed by the City Attorney's Office regarding those amendments. The specific questions that have arisen are:

1. When the voters approved Proposition B in 2002, granting subpoena power to the Ethics Commission, did the voters intend for that subpoena power to include the ability to subpoena witnesses during an investigation?
2. Would the use of subpoena power during investigations create due process problems in the absence of comprehensive procedures being incorporated into the Municipal Code?
3. Is the proposed new prohibition on the providing of false testimony or documentation during an Ethics Commission investigation preempted by the state law prohibition on perjury?
4. What risk of potential liability would be created by the City's adoption of the proposed amendments related to subpoena power and false testimony?

The short answers to these questions are:

- 1) The initiative language and ballot materials associated with Proposition B demonstrate an intent that the subpoena power granted by that initiative was intended to apply to all stages of the Commission's proceedings, including the investigation stage.
- 2) There is no legal requirement to adopt a comprehensive procedural ordinance in order for the Commission to exercise its subpoena power.
- 3) The proposed prohibition on providing false testimony or documentation during a Commission investigation is not preempted by state law.
- 4) There is little risk of City liability associated with approval of the proposed ordinances.

Analysis

1. Scope of the Commission's Subpoena Power

In 2002, the voters approved Proposition B, an initiative that granted subpoena power to the Ethics Commission. Proposition B added the following language to the City Charter, at section 41(d):

"For so long as an Ethics Commission remains established by ordinance of the Council, the Executive Director of the Commission shall be appointed by the Commission, subject to confirmation by the Council, and shall thereafter serve at the direction and pleasure of the Commission. The Commission may, in accordance with complaint and investigation procedures approved by ordinance of the Council, subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records, or other items material to the performance of the Commission's duties or exercise of its powers."

In the published ballot argument in favor of Proposition B, the following language appears: "The Ethics Commission now needs the power to do the work it was created to do. It needs the power to require witnesses to testify under oath and to produce documents that are needed to investigate alleged violations. The power to do this is called the power to subpoena" (emphasis added). No argument against the proposition was published.

The Commission is currently proposing that the City Council adopt amendments to the San Diego Municipal Code (SDMC) relating to the Commission's subpoena power. In pertinent part, these amendments provide that:

- Witness subpoenas can be issued during a Commission investigation
- Service of subpoenas shall be pursuant to the procedures set forth in Government Code section 11184(a) (during investigation), and Government Code section 11450.20(b) (following appointment of a Presiding Authority to conduct a Probable Cause Hearing or Administrative Hearing)
- The provisions of Government Code sections 11180-11191, in addition to the California Administrative Procedures Act, may be referred to for guidance in issuing subpoenas
- The Executive Director shall request issuance of subpoenas during an investigation only after reasonable efforts to obtain information on a voluntary basis¹, and the Commission shall issue a subpoena only upon findings that good cause supports its issuance, and that the information sought is material to a matter under investigation
- The Executive Director has authority to administer oaths and affirmations to witnesses
- Notice pursuant to Code of Civil Procedure section 1985.3 or Government Code section 7474 shall be given if a subpoena seeks the production of personal or financial records

In October 2008, former City Attorney Michael Aguirre issued a Report to the Mayor and City Council analyzing these proposed changes to the Commission's procedures. In that Report, the City Attorney took the position that extending the Commission's subpoena power to include witness subpoenas during an investigation was contrary to the intent of the voters in approving Proposition B. In support of that position, the City Attorney argued that the Municipal Code provisions related to subpoena power, which were adopted shortly before the election, provided evidence of voter intent and prevailed over the broader Charter language that the voters approved regarding the subpoena power.² The City Attorney's position that the voters were aware of these provisions is based on the publication of a digest of the ordinance (generally a one or two page summary) prior to the election.

The City Attorney's Report appears to be based upon a policy concern regarding potential abuse of the Commission's subpoena power, rather than a legal analysis. The City Attorney's conclusion that the voters did not intend to grant the Commission the power to subpoena witnesses during an investigation is not consistent with the fundamental rules of construction that apply to interpretation of initiatives.

In interpreting initiatives, courts first turn to the language of the initiative, and if it is not ambiguous, the inquiry ends and the plain language governs. People v. Elliott, 37 Cal.

¹ The proposed amendment allows the Executive Director to forego the requirement to seek voluntary compliance, but in that case must inform the Commission of that fact at the time the subpoena is requested.

² The position that the previously approved Municipal Code Sections would prevail over the Charter language, or somehow limit the application of the Charter language, ignores the maxim that a city charter is the supreme law of a city, subject only to conflicting provisions in the state or federal constitutions, or preemptive state law on matters of statewide concern. Harman v. City and County of San Francisco, 7 Cal. 3d 150, 161 (1972).

4th 453 (2005). When the language of an initiative is clear and unambiguous, there is no need to resort to any outside evidence or indicia of the voters' intent. Williams v. Superior Court, 92 Cal. App. 4th, 612 (2001). Additionally, in a case where there is a need to review outside evidence of the voters' intent, the material that is most likely to be considered is the argument and analysis included in the official ballot pamphlet. Robert L. v. Superior Court, 30 Cal. 4th 894, 904 (2003). The courts have specifically ruled that legislative antecedents not directly presented to the voters are not relevant to a court's construction of an initiative. Id. at 904-905.

The language of the initiative in question, which approved Charter Section 41(D), is unambiguous - it states that "The Commission may, in accordance with complaint and investigation procedures approved by ordinance of the Council, subpoena witnesses, compel their attendance and testimony . . ." Charter Section 41(D) specifically refers to the Commission's investigative function in the same sentence granting it authority to subpoena witnesses. There is no qualifying language in the initiative that would limit the use of witness subpoenas to probable cause and administrative hearings, or prohibit the use of witness subpoenas during investigations. Therefore, the language is unambiguous, and a court interpreting that language would likely find that there is no need to resort to a review of outside materials to determine the voters' intent.

Even if a court did review outside materials to determine the intent of this initiative, the materials that the court would be most likely to review would be the analysis and argument presented in the official ballot pamphlet. Robert L. v. Superior Court, 30 Cal. 4th 894, 904 (2003). The ballot argument for Proposition B stated that the Ethics Commission "needs the power to require witnesses to testify under oath and to produce documents that are needed to investigate alleged violations." Like the language of the initiative itself, this ballot argument specifically refers to the need for subpoena powers during investigation of violations, and contains no language suggesting that the subpoena power be limited to hearings only.

For these reasons, it is likely that a court reviewing the meaning of Charter section 41(D) would find the language to be unambiguous, granting the Commission subpoena power for witnesses and documents at any stage of their proceedings. As such, the proposed amendment to the Municipal Code clarifying that witness subpoenas can be issued during an investigation is not contrary to the intent of Proposition B, or the language of the Charter.

2. Use of Subpoenas During Investigations and Procedural Due Process

Another argument made in the City Attorney's report regarding the proposed expansion of the Commission's subpoena power is that a comprehensive scheme of procedures for the protection of witnesses would need to be added to the Municipal Code before the Commission could exercise any expanded subpoena authority. The "comprehensive procedures" called for by the City Attorney would include how interviews are to be conducted and recorded, whether targets of investigations are subject to subpoena, and whether a target would be notified that he or she is a target, whether an attorney will be

permitted to accompany the witness, and who will decide any claims of privilege. The City Attorney has cited no authority for the proposition that these procedures are necessary in order for the Commission to exercise its subpoena power. Other local Ethics Commissions with subpoena power, such as the City of Los Angeles, and the State Fair Political Practices Commission, have not adopted any similar procedures.

In the administrative context, procedural due process rights (such as the right to counsel, and the right to a hearing) apply only to parties with a recognized property interest at stake in the proceedings. Savient Pharmaceuticals Inc. v. Dept. of Health Services, 146 Cal. App. 4th 1457 (2007). Moreover, due process rights do not apply at all during the investigative stage of proceedings, because at that stage there is no adversary proceeding resulting in a determination of legal rights. Hannah v. Larche, 363 U.S. 420 (1960). Because a witness who has been subpoenaed as part of a Commission investigation has no due process rights, it cannot be argued that the "comprehensive procedures" called for by the City Attorney for subpoenaed witnesses are required as a matter of due process.

The SDMC, as currently drafted, contains detailed procedures regarding the issuance of subpoenas, set forth at section 26.0445. That section states that the Commission may refer to the State Administrative Procedures Act (APA) for guidance in exercising its subpoena power. The APA contains provisions regarding rights of subpoenaed witnesses, including the right to receive mileage fees, and the right to object to a subpoena through a motion to quash. Section 26.0445(f) provides a procedure by which a party who receives a subpoena can object and be heard by the Commission or the Presiding Authority, and also a right to appeal the Commission's decision to Superior Court.

The proposed amendments to section 26.0445 contain additional protections for those receiving subpoenas from the Commission. Those amendments incorporate by reference the subpoena procedures followed by the State Attorney General, Government Code sections 11180 through 11191. The proposed amendments also require the Executive Director to either seek voluntary compliance prior to issuing a subpoena during an investigation, or to inform the Commission when requesting the subpoena that voluntary compliance was not sought. Additionally, the proposed amendments to section 26.0445 require that witness subpoenas specify the areas of inquiry; that witnesses have a right to have their interviews recorded and to obtain a copy of the recording; and that subpoenaed witnesses have the right to counsel. The Commission's existing procedures and the proposed amendments provide significant protections for subpoenaed witnesses, and there is no legal requirement for the codification of additional procedures.

3. State Law Preemption and the Proposed Prohibition on False Testimony

The Commission is proposing to add a provision to the Municipal Code prohibiting the giving of false testimony, or production of false documents, in conjunction with a Commission proceeding. The new provision reads:

26.0416 Prohibition Against False Testimony and False Documentation

(a) It is unlawful for any person within the Commission's jurisdiction, as set forth in section 26.0413(a), to:

(1) knowingly make a false statement regarding a material fact during the course of a Commission investigation, a Probably Cause Hearing, or an Administrative Hearing; or

(2) submit any books, papers, records or other documentation during the course of a Commission investigation, a Probable Cause Hearing, or an Administrative Hearing knowing that such documentation contains false information regarding a material fact.

(b) Violations of this section are subject solely to administrative remedies contained in this Division.

In the City Attorney's October 2008 Report to the Mayor and Council, the City Attorney took the position that the Council should not approve this proposed ordinance because it is preempted by the state law prohibiting perjury, Penal Code section 118. The City Attorney asserts that state law preempts the proposed ordinance because state law already contains sanctions for the same conduct. The City Attorney's Report also argues, in the alternative, that state law preempts the proposed ordinance, because the ordinance contradicts state law, by providing only an administrative fine for activity that is criminal under state law.

A local ordinance is presumed to be valid, and a party that is asserting that a local ordinance is preempted by state law has the burden of proving that the ordinance is invalid. California Veterinary Medical Assn. v. City of West Hollywood, 152 Cal. App. 4th 536 (2007).

There are three distinct ways that state law can preempt a local ordinance. A local law is preempted by state law if it 1) duplicates state law; 2) contradicts state law; or 3) enters a field that has been fully occupied by state law, either expressly or by implication. Bravo Vending v. City of Rancho Mirage, 16 Cal. App. 4th 383, 397 (1993).

a. Preemption by Duplication

A local law is preempted by state law because it duplicates state law only when it is "identical" to the state law. Pipoly v. Benson, 20 Cal. 2d 366, 371 (1942). There is no duplication when the laws are not coextensive. Sherwin-Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 897 (1993). In the Sherwin-Williams case, the state law in question, Penal Code section 594.1, regulates the transfer and possession of aerosol paint, and requires merchants to post warnings about the illegality of vandalism. The local ordinance at issue required merchants to display aerosol paint in areas inaccessible to the public. In those circumstances, the local ordinance was upheld because it was different in scope and substance from the state law, although both were related to the subject of graffiti prevention. Id. at 902-906.

Similarly, in this case, the proposed ordinance and state perjury law both relate to providing false information, but otherwise the two laws are clearly not identical or coextensive. Perjury only applies to situations where an oath has been administered. People v. French, 134 Cal. App 694 (1933). The proposed false information ordinance applies to both statements under oath, and to informal statements that are not under oath. State perjury law is unlimited as to subject matter; however, the proposed false information ordinance applies only to statements and documents related to an Ethics Commission investigation. Additionally, the proposed ordinance involves a different penalty than state perjury law. Therefore, the proposed ordinance is not preempted based on duplication of state law.

b. Preemption by Contradiction

A local ordinance is preempted because it contradicts state law only when its purpose is "inimical" to that of the state law. Ex Parte Daniels, 183 Cal. 636 (1920). This is the case when a local ordinance prohibits what the state law intends to authorize, or otherwise fails to follow state mandates. Northern California Psychiatric Society v. City of Berkeley, 178 Cal. App. 3d 90, 105 (1986). Additionally, the fact that a local law imposes restraints that the state law does not is not a contradiction, but a reason for having a local ordinance. Fisher v. City of Berkeley, 37 Cal. 3d 644 (1984).

In this case, the proposed false information ordinance does not prohibit conduct that the state law intends to authorize, or otherwise fail to follow a state mandate. Therefore, it is not preempted based on contradicting state law.

c. Preemption by Entering a Fully Occupied Field

The state law is considered to "fully occupy" a field or subject matter either expressly, by declaring a legislative intent to preempt local regulation of that field, or by implication. Candid Enterprises Inc. v. Grossmont Union High School District, 39 Cal. 3d 878 (1985). In this case, there is no express language in the state perjury statute precluding local regulation.

State law occupation of a field by implication will be found only in one of the following circumstances: 1) the subject matter has been so fully and completely covered by state law as to clearly indicate that it is exclusively a state law concern; 2) the subject matter has been partially covered by state law, in terms that clearly indicate that a paramount state law concern will not tolerate further local action; or 3) the subject matter has been partly covered by state law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality. Fisher v. City of Berkeley, 37 Cal. 3d 644, 708 (1984). Finally, preemption by implication will not be found where there is a long tradition of local regulation. Western Oil and Gas Assn. v. Monterey Bay Unified Air Pollution Control District, 49 Cal. 3d 408 (1989).

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Here, several factors weigh in favor of a finding that the subject matter of "prohibiting false information" is not fully occupied by state perjury law. First, the scope of the state law prohibiting perjury is narrow, because it applies only to information provided under oath. Therefore, the subject of false information is not fully covered by the state law. Second, although state perjury law has been in existence since 1872, I have been unable to identify any published case or Attorney General opinion finding that state perjury law preempts a local false information ordinance. This is true even though local ordinances prohibiting false information are extremely common. A search of the San Diego Municipal Code revealed a number of existing "false information" ordinances within the same code, including: Section 27.0626 (false statement of qualifications); Section 52.05 (false information to a peace officer); Section 22.3510 (false complaint of discrimination in contracting); Section 22.3307 (false declaration regarding design-build contracting); Section 11.0401 (false or incomplete information prohibited in applications for City licenses, permits, etc.); Section 59.5.0606 (false and misleading statement or documents regarding noise abatement); Section 33.3207 (false information regarding swap meets); Section 64.0301(d) (false information regarding sewer discharge); Section 31.0140(f) (false information on declaration of business tax); Section 55.2701(d) (false information to a fire code officer); Section 86.2014 (false information regarding parking permits); Section 35.0124(b) (filing false return for transient occupancy tax); Section 22.0711 (improper influence of the City's outside professionals, adopted in June 2009). A review of approximately twelve municipal codes for other cities in San Diego County revealed that all of them contained similar false information ordinances, related to specific activities and subject matters.

Additionally, the false information ordinance is not likely to have an adverse effect on transient citizens of the state, as it applies only to parties and witnesses involved in a City of San Diego Ethics Commission investigation. Therefore, the ordinance is not preempted by state law on that basis.

Based on the authorities cited above, I do not believe that state perjury law preempts the proposed false information ordinance. It is different in scope, and does not contradict the purpose of the state law. It is unlikely to have any adverse effect on transient citizens of the state. Additionally, there is no authority that has found that state law fully occupies the field of "false information" laws, or otherwise preempts local ordinances, in spite of the long history of the state law coexisting with many local false information ordinances.

4. Risk of Liability Associated with Approval of Subpoena Power and False Testimony Provisions

A party seeking to challenge a legislative action, such as approval of an ordinance by the City Council, must do so by filing a writ of mandamus, pursuant to Government Code section 1085.³ This type of challenge has the potential to invalidate the challenged ordinance, but does not generally involve a demand for money or damages. The party challenging the ordinance has the burden of proving its invalidity, and the court is

³ A party challenging the application of an ordinance or procedure to a specific adjudicatory matter might also file a writ of administrative mandamus pursuant to Government Code section 1094.5.

required to presume that the City's actions in passing the legislation were valid. Evidence Code section 664; California Teacher's Assn. v. Ingwerson, 46 Cal. App. 4th 860 (1996). If the challenged action involves the exercise of discretionary legislative power, the courts will interfere with that exercise of power only if it is so palpably unreasonable as to constitute an abuse of discretion. United Assn. of Journeymen v. City and County of San Francisco, 32 Cal. App. 4th 751 (1995).

Because of these legal presumptions in favor of upholding legislative action, and because I believe that the proposed amendments are lawful, as described above in Sections 1 through 3, it is my opinion that there is a very low risk of liability based on approval of the proposed amendments.

I hope that this information has been helpful.

SAN DIEGO ETHICS COMMISSION REVIEW OF THE CITY'S
Enforcement Procedures

PROPOSED AMENDMENTS

Rev. August 6, 2009

**Chapter 2: Government
Article 7: Elections, Campaign Finance and Lobbying
Division 4: Ethics Commission**

STRIKEOUT VERSION

§26.0402 Definitions

Each word or phrase that is defined in this Division appears in the text of this Division in italicized letters. For purposes of this Division, the following definitions shall apply:

Administrative Enforcement Order to Respondent [no change in text]

Revised to
include
investigatory
subpoenas

Subpoena means a written order requiring a ~~witness's appearance~~ witness to appear and give testimony in connection with a *Commission* investigation or at a *Probable Cause* Hearing or *Administrative Hearing* to give testimony.

Subpoena duces tecum [no change in text]

§26.0416 Prohibition Against False Testimony and False Documentation

(a) It is unlawful for any *person* within the *Commission's* jurisdiction, as set forth in section 26.0413(a), to:

New section
making it
unlawful to
provide false
testimony or
documentation
to the Ethics
Commission.

- (1) knowingly make a false statement regarding a material fact during the course of a *Commission* investigation, a *Probable Cause Hearing*, or an *Administrative Hearing*; or
- (2) submit any books, papers, records, or other documentation during the course of a *Commission* investigation, a *Probable Cause Hearing*, or an

Enforcement of violation is subject to the SDMC's code enforcement procedures.

Administrative Hearing knowing that such documentation contains false information regarding a material fact.

- (b) A violation of subsection (a) is subject solely to the administrative remedies contained in Chapter 1, Article 2 of the Municipal Code. Pursuant to these remedies, the *Commission* may instruct the *Executive Director* to issue a Notice and Order to any *person* after the *Commission*, by a vote of at least five of its members, has determined that good cause exists to believe that the *person* has violated subsection (a). The Notice and Order shall describe the nature of the violation and may impose a civil penalty in accordance with section 12.0805. Upon the *person's* failure to comply with the provisions of the Notice and Order, the *Executive Director* may, as set forth in section 12.0807, request the appointment of an Enforcement Hearing Officer to conduct an Administrative Enforcement Hearing in accordance with Chapter 1, Article 2, Division 4 of the Municipal Code for the purpose of affirming the Notice and Order.

§26.0443 Service of Documents

- (a) Service of any document relating to the procedures set forth in this Division may be made by any individual who is not less than eighteen years of age. Documents may be served by any *Commission* employee.
- (b) Service may be made by personally delivering a copy of materials to a *Person*. Personal delivery means handing the materials to a *Person* or the *Person's* attorney or designated agent for service of process; or leaving it at the *Person's* office or at the *Person's* attorney's or designated agent's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or leaving it at the *Person's* dwelling house or usual

place of abode with some person at least eighteen years of age then residing therein.

- (c) Service may also be made by certified mail return receipt requested or by overnight mail to a *Person* if his or her name and address are known, or to a *Person's* attorney or designated agent for service of process. If service is made by mail, three calendar days shall be added to the period prescribed for a response. Service by mail is complete upon mailing.

- (d) Notwithstanding subsections (b) and (c), *Subpoenas* and *Subpoenas duces tecum* issued by the *Commission* during the formal investigation of a complaint shall be served in the same manner as provided in Government Code section 11184(a). *Subpoenas* and *Subpoenas duces tecum* issued after the *Commission* has appointed a *Presiding Authority* to conduct a *Probable Cause Hearing* or *Administrative Hearing* shall be served in the same manner as provided in Government Code section 11450.20(b).

New subsection detailing service requirements for subpoenas

§26.0445 Subpoenas and Subpoenas Duces Tecum

- (a) The *Commission* has the authority to issue *subpoenas* and *subpoenas duces tecum* pursuant to Section 41(d) of the San Diego Charter, and in accordance with the procedures in this Division. The Commission may refer to the California Administrative Procedures Act and California Government Code sections 11180-11191 for guidance in exercising its authority to issue *subpoenas* and *subpoenas duces tecum*.
- (b) During the formal investigation of a complaint, the *Executive Director* may seek *Subpoenas* and *Subpoenas duces tecum* by submitting a written request to the *Commission*.

Additional guidance from Gov't Code sections pertaining to state investigations

Additional requirements for issuance of investigatory subpoenas and subpoenas duces tecum

Gives Executive Director discretion to obtain subpoena w/o first seeking voluntary compliance so long as Commission is informed.

Establishes basis for granting subpoena request.

Witness must be advised of area of inquiry and right to counsel.

- (1) All requests for an investigatory Subpoena shall be accompanied by a declaration specifying the name and address of the witness and setting forth the materiality of the testimony being sought from the witness.
- (2) All requests for an investigatory Subpoena duces tecum shall be accompanied by a declaration specifying the documents or records sought, setting forth the materiality of the items sought, and stating that the witness has the items in his or her possession or under his or her control.
- (3) Requests for an investigatory Subpoena or Subpoenas duces tecum shall be made only after Commission staff has made reasonable efforts to obtain information on a voluntary basis, except that the Executive Director may exercise his or her discretion to forego this requirement so long as he or she notifies the Commission at the time of the request that voluntary efforts were not pursued.
- (4) The Commission shall grant the request only after a concurring vote of at least four of the Commissioners in closed session. The Commission shall not issue a Subpoena or Subpoena duces tecum during a formal investigation unless it finds, ~~based on information submitted to it in writing,~~ that good cause supports the issuance of the information to be requested in the Subpoena or Subpoena duces tecum, and that the information sought is material to a specific matter then under investigation.
- (5) Each Subpoena issued under subsection (b) shall notify the witness of the specific area of inquiry relating to the testimony sought, and of the fact that the witness has a right to be accompanied by legal counsel or any representative of his or her choosing while providing testimony.

Executive
Director may
administer
oaths.

- (6) The *Executive Director* shall have the authority to administer oaths and affirmations on behalf of the *Commission* to any witness providing testimony under subsection (b).

Witnesses have
right to obtain
recording of
their testimony.

- (7) Upon the request of any witness providing testimony pursuant to a *Subpoena* issued under subsection (b), *Commission* staff shall make an electronic recording of that testimony and provide a true and complete copy of that recording to the witness. Every witness providing testimony pursuant to a *Subpoena* issued under section (b) shall also have to right to make his or her own recording of any testimony provided by that witness.

- (c) After the *Commission* has appointed a *Presiding Authority* to conduct the *Probable Cause Hearing* or *Administrative Hearing*, the *Petitioner* and *Respondent* may seek *Subpoenas* and *Subpoenas duces tecum* in accordance with the following procedures:
- (1) All requests for a *Subpoena* must be submitted no later than twenty calendar days before a scheduled hearing; all requests for a *Subpoena duces tecum* must be submitted no later than thirty-five calendar days before a scheduled hearing.
 - (2) The *Petitioner* may seek *Subpoenas* and *Subpoenas duces tecum* by submitting a written request to the *Commission*. The *Commission* shall grant or deny the request within five calendar days of receipt of the request following a concurring vote of at least four of the Commissioners in closed session.
 - (3) The *Respondent* may seek *Subpoenas* and *Subpoenas duces tecum* by submitting a written request with the *Executive Director*, who shall promptly forward the request to the *Presiding Authority*. The *Presiding*

Authority shall grant or deny the request within five calendar days of receipt of the request.

- (4) All requests for a *Subpoena* or *Subpoena duces tecum* shall be accompanied by a declaration specifying the name and address of the witnesses and setting forth the materiality of their testimony. If the production of documents or records is sought, the declaration shall identify those items with specificity, set forth the materiality of the items, and state that the witness has the items in his or her possession or under his or her control.
- (5) A *Subpoena* or *Subpoena duces tecum* shall not be issued unless the information submitted pursuant to Section 26.0445(c)(4) states that the *Person* to be subpoenaed, or the information to be requested in the *Subpoena duces tecum*, is material to a specific matter at issue in the *Probable Cause Hearing* or *Administrative Hearing*.
- (6) The subpoenaing *Party* must serve a copy of the *Subpoena* or *Subpoena duces tecum* on every other *Party* to the administrative proceeding.

- (d) In the event a *Subpoena duces tecum* seeks either the production of personal or ~~financial~~ records of a consumer, as that term is defined in California Code of Civil Procedure section 1985.3, or the financial records of a customer, as that term is defined in California Government Code section 7465, notice to that consumer or customer shall be given as required by California Code of Civil Procedure Section 1985.3 or Government Code Section 7474, whichever is applicable.

Clarifies state law notice requirements for personal and financial records.

- (e) *Subpoenas* shall be served at least ten calendar days before the time required for attendance. *Subpoenas duces tecum* shall be served at least twenty-five calendar days before the time required for the production of the requested documents. A

Subpoena or *Subpoena duces tecum* shall be served in accordance with the provisions set forth in Section 26.0443(d).

- (f) A *Person* served with a *Subpoena* or *Subpoena duces tecum* may object to its terms by filing written objections with the *Commission* no later than seven calendar days before the time required for attendance and/or production of the requested documents. If the *Subpoena* or *Subpoena duces tecum* was issued by a *Presiding Authority* other than the full *Commission*, the written objection shall be promptly forwarded to the *Presiding Authority*.
- (1) If the *Subpoena* or *Subpoena duces tecum* was issued by the *Commission* at the request of the *Executive Director* or *Petitioner*, the *Commission* shall rule, in closed session, on the objections at a regular or special meeting on or before the date of the *Commission's* next regularly scheduled meeting, or as soon thereafter as practicable. The *Commission* shall issue a written order on its ruling within five calendar days of making the ruling, and the *Executive Director* shall promptly serve the order on the *Person* making the objections.
- (2) If the *Subpoena* or *Subpoena duces tecum* was issued by the *Presiding Authority* at the request of the *Respondent*, the *Presiding Authority* shall rule on the objections and/or issue an order in writing within five calendar days of receiving the written objections.
- (3) All obligations to respond to *Subpoenas* or *Subpoenas duces tecum* that are subject to written objections shall be stayed pending the ruling by the *Commission* or *Presiding Authority* pursuant to subsection (f)(1) or (f)(2).
- (4) A failure to file a timely objection with the *Commission* or *Presiding Authority* constitutes a waiver of all grounds for any objection.

(5) All petitions for judicial review of any *Commission* or *Presiding Authority* ruling or order concerning objections to a *Subpoena* or *Subpoena duces tecum* must be filed by the tenth calendar day following the date of the ruling or order by the *Commission* or *Presiding Authority*.

(g) If the *Party* serving the *Subpoena duces tecum* consents, the custodian of records or documents that is the subject of a *Subpoena duces tecum* may satisfy the *Subpoena duces tecum* by delivering the requested documents together with an affidavit in compliance with California Evidence Code section 1561.

(h) ~~It is unlawful for any *Person* to refuse to obey a *Subpoena* or *Subpoena duces tecum* issued by the *Commission* or *Presiding Authority*. Failure to obey a *Subpoena* or *Subpoena duces tecum* constitutes contempt and may be prosecuted as a misdemeanor.~~

Language
moved to
subsection (h).

~~(h)~~ If any *Person* refuses to attend or testify or produce any papers as required by a *Subpoena* or *Subpoena duces tecum*, the *Executive Director*, on behalf of the *Commission* or *Presiding Authority*, may petition the San Diego Superior Court for an order compelling the person to attend and testify and to produce the papers required by the *Subpoena* or *Subpoena duces tecum*, in accordance with the standards and procedures set forth in the California Administrative Procedures Act ~~and California Government Code sections 11180 through 11191~~. Failure to comply with a *Subpoena* or *Subpoena duces tecum* issued pursuant to this section may be punished as a contempt of court and may be prosecuted as a misdemeanor.

Language
moved from
previous
subsection.

~~(h)~~(i) A witness, other than an officer or employee of the City of San Diego, appearing pursuant to a *Subpoena*, shall receive, upon request after complying with the

Subpoena, the same mileage and fees allowed by law to a witness in a civil case pending in the San Diego Superior Court.

~~(k)~~(j) All costs related to a *Subpoena* or *Subpoena duces tecum*, including photocopying, service, witness, and mileage fees, shall be borne by the *Party* requesting the *Subpoena* or *Subpoena duces tecum*.

~~(k)~~(k) The *Commission* shall develop policies and procedures relating to the issuance of *Subpoenas* and *Subpoenas duces tecum* in formal investigations, *Probable Cause Hearings*, and *Administrative Hearings*, including the form of such documents and related costs.